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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 565

KITTY HAWK DEVELOPMENT CO., a corporation,
Appellant

v.

THE CITY OF COLORADO SPRINGS, a municipal corporation, *Appellee*

On Appeal from the Supreme Court of Colorado

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Appellee, the City of Colorado Springs, has filed a motion to dismiss Kitty Hawk's appeal on the grounds that no substantial Federal question is presented, the judgment below rests on an adequate non-Federal basis, and the Federal question was not passed on by the Colorado Supreme Court. In each instance, the City

premises its argument on erroneous assumptions and fails to meet the record and the issues actually before the Court.

In its outline of the facts, the City states (p. 5) that the payment of $25,378.08 was made by Kitty Hawk "to receive the city water and sewer service". The same assumption is made in the Question Presented (pp. 1-2). If the City means that the money was paid because Kitty Hawk had no choice but to pay in order to obtain the necessary water and sewer services, we agree. But if the City means that the money was paid to *compensate* the City for water and sewer services, this simply is not true and is not even a matter for speculation. The Assistant City Attorney himself prepared the receipt given to Kitty Hawk at the time of payment, and it clearly shows that the money was paid in lieu of 8% of the land as required by the City's subdivision ordinance.[1] The only relationship between the payment and the services was that the City refused to render the services until and unless Kitty Hawk turned over 8% of the value

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[1] The receipt reads:

> Receipt is hereby acknowledged from Kitty Hawk Development Co. of the sum of Twenty-five Thousand Three Hundred Seventy-Eight and 08/100 Dollars ($25,378.08) in full payment of eight per cent (8%) of the appraised value of the land in Kitty Hawk Subdivision in lieu and in place of the allocation of eight per cent (8%) of the area of land in said subdivision and all in accordance with resolutions of the City Council of Colorado Springs relating to allocation of land in each subdivision or payment in cash in lieu thereof.
>
> THE CITY OF COLORADO SPRINGS
> By /s/ LOUIS JOHNSON
>
> [Plaintiff's Exhibit H (fols. 409, 196).]

of its land. This is, of course, the very condition which Kitty Hawk claims is unconstitutional.

In a similar vein, the City refers (p. 8) to a stipulation that subsequent to annexation, "water and sewer lines and other utilities were installed; streets built and other municipal services * * * furnished." Here again, the inference is that Kitty Hawk got value received for its money; that its payment was to compensate the City for improvements to the land. But the City neglects to set forth the remainder of the stipulation, which clearly shows that Kitty Hawk received no benefits other than those accorded all property owners in the City, and that Kitty Hawk paid the same City taxes that other property owners paid.[2] Kitty Hawk made its payment not to compensate the City for improvements but because the subdivision ordinance required an 8% donation of property. The evidence is uncontradicted that capital improvements were furnished at the sole expense of Kitty Hawk—at a cost of almost $200,000.00. Fol. 282.

The City cites *Hunter* v. *Pittsburg*, 207 U.S. 161, 179 (1907), in support of its first argument (p. 7)

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[2] The remainder of the stipulation reads: "* * * The property in Kitty Hawk Subdivision and the owners thereof have received no services or benefits not also accorded to other property annexed to the City and other property owners in the City of Colorado Springs; the property owners in Kitty Hawk Subdivision have paid property and other City taxes in the same manner as other property owners in the City of Colorado Springs and other subdividers and property owners similarly situated to the plaintiff herein have paid the 8% subdivision fee and other fees and charges required to be paid by the plaintiff. There has been nothing in the services performed for, or the benefits conferred upon, the property and property owners in Kitty Hawk Subdivision of a special nature or out of the ordinary, nor has there been anything unusual about the tax burden borne by the property and property owners in Kitty Hawk Subdivision since its annexation." Fols. 107-109.

that a state legislature, "conforming its action to the state constitution, may do as it will [in regard to the powers of political subdivisions], unrestrained by any provision of the Constitution of the United States." This same argument, also supported by the *Hunter* case, was made to this Court in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)—and was rejected. After discussing *Hunter* and other cases, the Court pointed out in *Gomillion* that it has "never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.* at 344-345. The Court specifically cited the *Frost* case[3] with approval (*id.* at 345), and it concluded:

> This principle [that a State cannot use its power to circumvent a federally protected right] has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." What the Court has said in those cases is equally applicable here, *viz.*, that "Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States* v. *Reading Co.*, 226 U.S. 324, 357, *and a constitutional power cannot be used by way of condition to attain an unconstitutional result.*" *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105, 114. [364 U.S. at 347-348; emphasis added.[4]]

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[3] *Frost & Frost Trucking Co.* v. *Railroad Comm'n of California*, 271 U.S. 583 (1926). See our Jurisdictional Statement, pp. 12-15.

[4] This same principle was subsequently approved in *Baker* v. *Carr*, 369 U.S. 186, 229-231 (1962), and *Gray* v. *Sanders*, 372 U.S. 368, 381 (1963).

There could hardly be a clearer statement of the doctrine involved in this case or a clearer indication that it is as applicable today as it was when first enunciated.

The City contends (pp. 7-8) that Kitty Hawk had no constitutional right to annexation. We need not pause over this argument, because Kitty Hawk has not claimed a constitutional right to annexation. The same must be said of the contention (pp. 8-9) that Kitty Hawk had no constitutional right to receive City water. The City does not seem to understand that a municipal benefit, even when it may be withheld altogether, cannot be granted on condition that a constitutional right be surrendered. This rule, totally ignored by the City in its Motion,[5] has been reiterated time and again, though not always in precisely the same form or context. For example:

> [A] constitutional power cannot be used by way of conditions to attain an unconstitutional result. [*Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, 114 (1918), and *Gomillion* v. *Lightfoot*, *supra*, 369 U.S. at 347-348.]
>
> The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. [*Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1, 47-48 (1910) (and see the cases cited at pages 35-36).]
>
> [A] State may not, in imposing conditions upon the privilege of a foreign corporation's doing busi-

[5] The closest the City comes to recognizing that it has no absolute right of condition is when it states on page 8 that a municipality's discretion as to how far it will extend its water mains is determinative "unless such discretion is abused." It has been abused three times over in this case. Jurisdictional Statement, p. 12.

> ness in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts * * *. [*Terral* v. *Burke Constr. Co.*, 257 U.S. 529, 532 (1922).]
>
> [T]he State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. [*Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 434 (1926) (and cases there cited).]
>
> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. [*Frost & Frost Trucking Co.* v. *Railroad Comm'n*, *supra*, 271 U.S. at 593-594.]
>
> [T]he corporation's entry may not be conditioned upon surrender of constitutional rights * * *. [*Washington ex rel. Bond & Goodwin & Tucker, Inc.* v. *Superior Court*, 289 U.S. 361, 365 (1933).] The City has no power to make its license to an auditorium-user depend on the licensee's giving up a constitutional right. [*Bynum* v. *Schiro*, 219 F. Supp. 204, 210 (E.D. La. 1963), *aff'd per curiam*, 374 U.S. 395 (1964).]

Never once does the City come to grips with the principle established by these cases. It concedes (pp. 3-4, 10) that the City conditioned annexation and water on the giving up of property and that no compensation

was paid for the property. Yet it contents itself with arguing that Kitty Hawk had no constitutional right to annexation or water. It thus flails at strawmen.

The City next argues (pp. 9-12) that the judgment rests on an adequate non-federal basis. The City does not dispute that Kitty Hawk raised its Federal constitutional questions at all appropriate stages in the courts below. The City argues instead that these questions were not passed upon by the Colorado Supreme Court, and that Kitty Hawk "agreed," or contracted, to give up its land in order to obtain certain services (which the City does not deny were essential to the survival and use of the remaining property).

Precisely the same kind of "contractual" argument was made to this Court—and rejected—in *Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494 (1926), where the state court had ruled[6] that because the General Assembly had the power to prescribe the conditions upon which foreign corporations could do business in the state, the Assembly could make past compliance with an unconstitutional tax a condition to the renewal of a license to do business. When the taxpayer appealed, the very first three arguments made by the County Treasurer in his brief to this Court were that: "The State of Illinois had the right to prescribe the terms and conditions upon which plaintiff in error might transact business within the borders of the State";[7] "Plaintiff in error came into the State of Illinois for the transaction of business with full notice of the payments of money which it would be required

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[6] *Hanover Fire Ins. Co.* v. *Carr*, 317 Ill. 366, 148 N.E. 23 (1925), *rev'd sub nom. Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494 (1926).

[7] Brief for Defendant in Error, *Hanover Fire Insurance Company* v. *Carr*, October Term 1925, No. 179, p. 10.

to make";[8] and "The obligation of plaintiff in error is a contract obligation, the presumption being that when it accepted and exercised the privilege it assented to the obligation to pay the tax in question."[9]

But this Court overruled the state court, rejected these contentions and held:

> One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits, is contractual, and that, by coming into the State and engaging in business on the conditions imposed, it waives all constitutional restrictions, and can not object to a condition or law regulating its obligations, even though, as a statute operating *in invitum*, it may be in conflict with constitutional limitations. This argument can not prevail in view of the decisions of this Court in well considered cases. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Western Union Telegraph Company* v. *Kansas*, 216 U.S. 1; *Terral* v. *Burke Construction Co.*, 257 U.S. 529; *Fidelity & Deposit Company* v. *Tafoya*, 270 U.S. 426; *Frost* v. *Railroad Commission*, 271 U.S. 583. [272 U.S. at 571[10].]

And so here, Kitty Hawk was given the alternative of surrendering its property without compensation or foregoing the essential services that only the City could render. Having been thus compelled to give up its property, Kitty Hawk cannot now be held to have "contracted" away its right to complain of the depri-

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[8] *Id.* at p. 16.

[9] *Id.* at p. 20.

[10] Cited with approval, *e.g.*, in *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 571 (1949), and *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150, 166-167 (1940).

vation. We flatly deny the existence of any such "contract."

This Court, of course, determines for itself whether there is an adequate, independent non-Federal ground on which the judgment rests,[11] and in so doing reaches its own conclusion as to the practical effect and operation of challenged regulations.[12] The failure of a state court to pass upon a constitutional issue, or its failure to *say* that it passed upon the issue,[13] is not conclusive.[14] In this case, there is no non-Federal ground, adequate or otherwise. Every one agrees that the City conditioned the grant of the essential benefits of water, annexation and subdivision upon Kitty Hawk's giving up its property without compensation. Therefore, the Colorado Court should never have reached any question of "contract," because the City had no right even to put Kitty Hawk to the choice. (See our Jurisdictional Statement, p. 18). But even if a question of "contract" were involved, it is one of mixed law and

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[11] *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958); *Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

[12] *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, 392 (1952); *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 29 (1951).

[13] It is not at all certain that the Federal question *was* ignored by the Colorado Supreme Court. The essence of that Court's decision, in our view, is in the following language: "We find nothing in the general law of this state or in the Constitution prohibiting the imposition of conditions by a municipality upon one seeking annexation." Appendix to Jurisdictional Statement, p. 13a.

[14] *Wood* v. *Chesborough*, 228 U.S. 672, 676-680 (1913); *West Chicago St. R. R.* v. *Illinois ex rel. Chicago*, 201 U.S. 506, 519-520 (1906); *Chicago, B. & Q. Rw.* v. *Illinois ex rel. Drainage Comm'rs*, 200 U.S. 561, 580-581 (1906).

fact inextricably bound up in the constitutional issue itself. Thus, a resolution of the constitutional issue "was necessarily involved in the judgment or decree as rendered." *Bolling* v. *Lersner*, 91 U.S. 594, 595 (1876).

We respectfully submit that the Motion to Dismiss should be denied and probable jurisdiction noted so that this important case may be heard on the merits.

Respectively submitted,

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